

ARKANSAS SUPREME COURT

No. CR 05-656

NOT DESIGNATED FOR PUBLICATION

PATRICIA BOOKER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 23, 2006

APPEAL FROM THE CIRCUIT COURT OF
SEBASTIAN COUNTY, FT. SMITH DISTRICT,
CR 2002-1189, HON. JAMES ROBERT
MARSCHEWSKI, JUDGE

AFFIRMED; MOTION TO BE RELIEVED AS
COUNSEL GRANTED

PER CURIAM

Patricia Booker was found guilty by a jury of possession of cocaine with intent to deliver, possession of drug paraphernalia, and maintaining a drug premises for drug sales. She received an aggregate sentence of twenty-six years' imprisonment. The Arkansas Court of Appeals affirmed. *Booker v. State*, CACR 03-1397 (Ark. App. December 1, 2004).

Subsequently, Booker timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1 claiming she did not receive effective assistance of counsel during her trial. After a hearing, the trial court denied the petition, and Booker has lodged an appeal in this court from that order.

Appellant Booker's counsel on appeal to this court has filed a brief asserting that any appeal of the denial of postconviction relief would be wholly without merit and asks that he be allowed to withdraw as counsel. *Anders v. California*, 386 U.S. 738 (1967) and Arkansas Supreme Court Rule 4-3(j)(1) set requirements for the withdrawal of counsel for a defendant in a criminal case after a notice of appeal has been filed on the basis that an appeal is without merit. Under the rule, a court-appointed attorney who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to the appellant. While a "no-merit" brief is typically filed in a direct appeal from a judgment, no-merit briefs in postconviction appeals are also proper. See *Hewitt v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 12, 2005) (*per curiam*); *Brady v. State*, 346 Ark. 298, 57 S.W.3d 691

(2001) (*per curiam*).

Appellant was provided a copy of counsel's brief and filed *pro se* points on appeal for reversal. The State filed a response to appellant's points for reversal. Based on our review of the issues presented, we conclude that the appeal should be affirmed, and we grant the motion to withdraw.

The charges against appellant stemmed from a controlled drug buy in 2002. As a result of the drug buy made by a confidential informant, the Fort Smith Police Department sought and obtained a search warrant for 1710 North J Street, where appellant lived. The affidavit submitted in support of the search warrant alleged that the drug buy had occurred within the twenty-four hour period prior to the issuance of the affidavit. During the raid on the premises pursuant to the search warrant, the police recovered crack cocaine, money, a wireless camera and other items. The police seized money found on appellant's person and in various places in appellant's house. The contraband was recovered in a utility room at the end of the carport that was attached to the house and in a closet where one of the persons arrested was found to be hiding.

Prior to her trial, appellant's attorney sought to exclude all evidence recovered in the raid. Appellant contended that the initial affidavit filed by Fort Smith Police Officer Wayne Barnett was not sufficient to support the search warrant due to the lapse of time between the drug buy and the issuance of the warrant. Counsel further argued that there was no probable cause to issue the search warrant and that the search warrant did not encompass the utility room. The trial court held a hearing on the motion to suppress and denied the motion. During appellant's jury trial, appellant's attorney continued his objection to the entry of all evidence recovered during the raid, which the trial court continued to deny.

In her petition for postconviction relief, appellant objected to various aspects of the search warrant issued. Appellant also claimed that her trial counsel violated the Rules of Professional Conduct which rendered his assistance to her ineffective. Further, at the hearing on the petition, appellant orally amended her grounds to include the allegation that she was medicated during trial

and unable to properly assist her attorney with her defense. The trial court entered an order finding that appellant's counsel did not provide ineffective assistance.

Strickland v. Washington, 466 U.S. 668 (1984), sets out appellant's burden when claiming ineffective assistance of counsel. Appellant must demonstrate two components: first, appellant must show that trial counsel's performance was deficient and fell below an objective standard of reasonableness; second, appellant must show that the deficient performance prejudiced the defense and deprived appellant of a fair trial. *Strickland, supra*; *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). The errors must have actually had an adverse effect on the defense to violate the Sixth Amendment guarantees of right to counsel. *Strickland, supra*; *Andrews, supra*.

Unless appellant makes both *Strickland* showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Chenowith v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000) (*per curiam*); *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997).

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The various issues raised by appellant can be distilled into three distinct challenges.¹ First, appellant maintains that there was insufficient evidence to support the issuance of the search warrant and the affidavit in support of the search warrant and to support appellant's charges and conviction. She further maintains that she is innocent of the crimes for which she has been convicted. In the

¹Appellant raised numerous issues in her original petition for postconviction relief, at the hearing on her petition, and in her *pro se* points on appeal filed with this court. For the purpose of clarity, the points on appeal to this court have been organized in this opinion in order to consolidate these various allegations.

second point, appellant argues that she was incompetent during her trial. Finally, appellant alleges that her trial counsel provided ineffective assistance.

For the first major point on appeal, appellant puts forth myriad arguments related to sufficiency of the evidence. Specifically, with regard to the search warrant and the affidavit in support of the search warrant, appellant's sub-points, which overlap, are: (a) that the affidavit and search warrant were based on a "stale" drug buy; (b) that the affidavit did not sufficiently reference the time, date and location that the drug buy had occurred; (c) that no probable cause existed for issuance of the search warrant; (d) that there was insufficient evidence to support the affidavit; and (e) that the affiant improperly referenced appellant's prior criminal history. Additionally, appellant flatly claims that insufficient evidence existed to support the charges and conviction in her case, and that she is innocent of the charges.

Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction, and is not a means for direct attack on the judgment. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (*per curiam*). Postconviction proceedings under Ark. R. Crim. P. 37.1 do not provide a remedy when an issue could have been raised at trial or argued on appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Therefore, we do not permit an appellant to re-challenge the sufficiency of the evidence at trial in a postconviction proceeding. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Here, each of appellant's arguments related to the search warrant, the affidavit in support of the search warrant, the charges filed against her, and her conviction are merely claims related to the sufficiency of the evidence. In her last point on this issue, appellant asserts her actual innocence as another basis for her appeal. A claim of actual innocence is likewise a challenge to the sufficiency of the evidence, which is yet another direct attack on the judgment below. *Johnson, supra*.

Appellant next claims that she was incompetent during her trial and unable to assist her counsel with her defense. A defendant who did not raise the issue of incompetence at trial may nevertheless raise the issue in a petition for postconviction relief. *Henry v. State*, 288 Ark. 592, 708

S.W.2d 88 (1986) (*per curiam*). The reason for this rule is that “a person who is incompetent cannot knowingly and intelligently waive his right to have the court determine his capacity to stand trial.” *Id.* at 593-94, 708 S.W.2d at 89, *citing Pate v. Robinson*, 383 U.S. 375 (1966).

Appellant’s trial counsel testified at the hearing on appellant’s Rule 37.1 petition that if he thought that appellant should have received a mental evaluation, he would have ordered one. Instead, counsel encountered no difficulty in communicating with appellant, found that she appeared to understand and be aware of the charges and the evidence against her, and believed that her demeanor and behavior did not warrant a mental examination. Appellant and counsel discussed appellant’s options and her testimony during the trial, and appellant continued to maintain her innocence throughout the trial.

At one point during the trial, when trial counsel was cross-examining Officer Barnett, counsel requested permission of the court to confer with appellant. After conferring, counsel asked Officer Barnett additional pertinent questions related to appellant’s arrest. Appellant was apparently sufficiently aware to assist her attorney at a crucial point in the trial. Also, trial counsel noted that appellant clearly stated that her defense would be that the contraband was not hers, and her trial testimony competently communicated this defense.

The trial judge who presided over appellant’s Rule 37.1 petition also presided over her jury trial. In his order denying appellant’s petition, the trial judge noted that appellant did not request a competency hearing and determined that appellant’s testimony during the trial was “responsive and self[-]serving.” The judge found no evidence to support appellant’s claim of incompetency and appellant’s trial counsel had no indication that appellant “was under the influence of any drugs that would affect her capacity to reason or express herself.” Although a United States District Court magistrate found that appellant had a diminished mental state in 2004, the trial judge did not find the ruling to be dispositive of appellant’s condition at the time of her jury trial or at the time of her Rule 37.1 petition hearing.

A petitioner who asserts her incompetence for the first time in a petition for postconviction

relief has the heavy burden of demonstrating with facts that she was not competent at the time of trial. *Matthews v. State*, 332 Ark. 661, 966 S.W.2d 888 (1998) (*per curiam*), *citing Henry, supra*. Other than appellant's testimony at the hearing, we have no indication that she suffered from any mental disability during her trial. Moreover, appellant's trial counsel testified that he had no indication that a mental evaluation was warranted at that time. We find no error and affirm the trial court on this point.

Finally, appellant alleges that her trial counsel provided ineffective assistance and states a number of bases for this claim. Her sub-points on this issue are: (a) that the search warrant and affidavit in support were improper; (b) that there was insufficient evidence to support appellant's charges and conviction; (c) that trial counsel failed to preserve issues for appeal related to the search warrant; (d) that the motion to suppress was not taken up until the day before the jury trial; (e) that the trial counsel did not present any form of defense; (f) that counsel failed to challenge the evidence; (g) that the prosecutor improperly referenced appellant's prior criminal history; (h) trial counsel violated the Rules of Professional Conduct in that he did not adequately represent appellant, that he did not sufficiently consult with appellant and that he lacked diligence in his representation of appellant.

The question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland*. Appellant must show that counsel's performance was deficient and this deficient performance deprived appellant of a fair trial. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id*. Because of this standard, the burden is on appellant to provide facts to support her claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without

factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Further, conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

As to appellant's argument that the search warrant and the affidavit supporting the search warrant were improper, appellant is essentially arguing that trial counsel was ineffective for failing to prevail on the motion to suppress. Trial counsel strenuously argued to the trial court each of the points repetitiously raised by appellant, and continued to argue throughout the trial for suppression of the evidence resulting from the search of appellant's home. Each time, the trial court denied counsel's motions.

Appellant's argument on this point has no merit. The fact that the trial court adversely ruled against counsel's motion is not sufficient to prove ineffective assistance. Appellant has failed to show that trial counsel's performance was deficient, has failed to show on what basis she would have prevailed in the trial court, especially in light of trial counsel's thorough arguments to the court, and has failed to show how she was prejudiced by trial counsel's actions.

Next, appellant argues there was insufficient evidence to support the charges against her and her conviction. As such, her argument is merely a challenge to the sufficiency of the evidence. Appellant raised the issue of sufficiency of the evidence on direct appeal and cannot do so again in the guise of a claim for ineffective assistance of counsel.

Appellant claims several additional bases for ineffective assistance of counsel. These points are: that trial counsel failed to preserve issues to be challenged on appeal related to the search warrant; that the motion to suppress was not taken up until the day before the jury trial; that trial counsel did not present any form of defense; that counsel failed to challenge the evidence. The claims are mere conclusory statements raised for the first time on appeal in appellant's *pro se* points on appeal. It is well settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Next, appellant alleges that the prosecutor improperly referenced appellant's prior criminal

history and that trial counsel failed to allege prosecutorial misconduct, which appellant brought up during the hearing on her Rule 37.1 petition. While the prosecutor did reference appellant's prior prison term during the State's rebuttal closing argument, appellant began her testimony at the trial by disclosing this information to the jury prior to such information's being brought out on cross-examination. Making such a disclosure is largely a matter of trial strategy. *See Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Trial counsel's decision, as a matter of trial strategy and tactics, even if arguably improvident, falls within the realm of trial counsel's professional judgment and is not grounds for a finding of ineffective assistance of counsel. *Noel, supra*. Appellant failed to show that she suffered actual prejudice or received ineffective assistance of counsel on this point.

Finally, appellant maintains that her attorney violated the rules of professional conduct. Appellant fails to explain how an alleged violation of the Model Rules of Professional Conduct translates into a claim of ineffective assistance of counsel. Without citation to authority or convincing argument, we do not consider claims of error made on appeal. *Greene, supra*. We hold that the trial court did not err when it made a finding that appellant's counsel did not violate the professional conduct rules, but provided effective assistance and acted in a "competent and conscientious" manner.

Based on the totality of the evidence, we cannot say that the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland*. Therefore, we affirm the decision of the trial court.

Since there is no merit to the appeal, counsel's motion to withdraw is granted.

Affirmed; motion to be relieved granted.